FILED
JAN 14 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 623

THE TRAVELERS INSURANCE COMPANY,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

WAYNE E. STICHTER,
240 Huron Street,
Toledo, Ohio,
Attorney for Petitioner.

EASTMAN, STICHTER & SMITH,
240 Huron Street, Toledo, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9847

TABLE OF CONTENTS.

Opinions Below 1

Grounds on Which Jurisdiction Is Invoked 2

Questions Presented for Review 2

Statement of Case 2

Reasons for Allowance of Writ 7

Appendix:

Opinion of the District Court in Cases Numbers 6878 and 6910 17

Opinion of the United States Court of Appeals for the Sixth Circuit, Cases Numbers 12355 and 12356 22

Judgment of the United States Court of Appeals—Case No. 12,355 28

Judgment of the United States Court of Appeals—Case No. 12,356 29

TABLE OF AUTHORITIES.

Cases.

Bergholm v. Peoria Life Insurance Company, 284 U. S. 489, certiorari granted 284 U. S. 605, 50 F. (2d) 67 (5th Cir.) (1931) 9, 12

Equitable Life Assur. Society of the United States v. Wells, 101 F. (2d) 608 (6th Cir.) (1939) 10

Guaranty Company of North America v. Mechanics' Savings Bank and Trust Company, 183 U. S. 402, Certiorari allowed, 100 Federal Reports 559 (1902) 9

Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452 (1894) 9

Kirby v. Federal Life Insurance Company, 35 F. (2d) 126 (6th Cir.) (1929) 9, 13

Lincoln National Life Insurance Co. v. Ghio, 111 F. (2d) 307 (8th Cir.) (1940) 10

Millers' Mutual Fire Insurance Association v. Warroad Potato Growers Association, 94 F. (2d) 741 (8th Cir.) (1938) 10

Rose v. The New York Life Insurance Co., 127 Ohio St. 265, 187 N. E. 859 (1933) 8, 10

State Mutual Life Assur. Co. of Worcester v. Briscoe, 107 F. (2d) 977 (6th Cir. Ohio) (1939) 8, 11

Stickel v. Excess Insurance Co. of America, 136 Ohio St. 49, 23 N. E. (2nd) 839 (1939) 8, 10

Terry v. New York Life Insurance Co., 104 F. (2d) 498 (8th Cir.) (1939) 10

Travelers' Insurance Co., The, v. Myers & Company, 62 Ohio St. 529, 57 N. E. 458 (1900) 8, 10

Travelers Ins. Co. v. Springfield Fire & Marine Insurance Co., 89 F. (2d) 757 (8th Cir.) (1937) 10

United States Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34, certiorari granted 280 U. S. 540, 31 F. (2d) 919 (6th Cir.) (1929) Ohio 9, 12

Williams v. Union Central Life Ins. Co., 291 U. S. 170, certiorari granted 290 U. S. 613, 65 F. (2d) 240 (5th Cir.) (1933) 9, 13

Statutes.

Federal Employers' Liability Act, U. S. C., Title 45, Section 51 2

United States Code, Title 28, Section 1254 (1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. _____.

THE TRAVELERS INSURANCE COMPANY,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decrees of the Court of Appeals for the Sixth Circuit in Cases Numbers 12355 and 12356 on the docket of said Court of Appeals, filed on October 19, 1955 and October 20, 1955, respectively, which decrees reversed, with directions, the orders of the United States District Court for the Northern District of Ohio, Western Division, entered June 11, 1954.

OPINIONS BELOW.

The opinion of the United States Court of Appeals, filed on October 19, 1955, is reported in 226 F. 2d 520, and is appended to this Petition at page 22. The opinion of the District Court, filed on May 5, 1954, is not yet reported, and is appended hereto at page 17.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The dates of the decrees sought to be reviewed, and the dates of the entry thereof, are October 19 and October 20, 1955.

The statutory provision believed to confer on this Court jurisdiction to review the decrees in question by writ of certiorari is the United States Code, Title 28, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

The fundamental question presented in this Petition is whether the phrase "while being transported to or from work", contained in an exception to an exclusion clause of an automobile liability insurance contract, is ambiguous. Specifically, were O'Hara and Cook—who on October 8, 1951 were ordered by their employer, the Respondent, to take Respondent's bus to Dunkirk, Ohio, for the sole purpose of procuring needed camp equipment and who at the very moment of the accident in which they were injured were engaged in hauling such equipment as ordered—"being transported to or from work" within the meaning of said automobile liability insurance contract?

STATEMENT OF CASE.

One Alvin O'Hara, an employee of Respondent, The Pennsylvania Railroad Company, brought an action under the Federal Employers' Liability Act, U. S. C., Title 45, Sections 51 and following, against Respondent in the United States District Court for the Northern District of Ohio, Western Division, claiming that he was injured on October 8, 1951 while engaged in the performance of certain assigned duties of his employment; said injuries occurred when the bus in which O'Hara was riding while performing such duties left the road and struck a house.

A similar action was brought by one Robert T. Cook against Respondent in the same court for injuries received by Cook in the same accident while said Cook was engaged in the performance of his duties and while riding in said bus.

In each of these actions Respondent filed a Third Party Complaint against L. A. West, the owner of the bus, and against Petitioner, The Travelers Insurance Company, which had issued an automobile public liability insurance policy to L. A. West on the bus in question, praying judgment against said West and Petitioner for such sums as Respondent might become legally obligated to pay as damages to O'Hara and Cook. In each action Petitioner filed an Answer and a Counterclaim for declaratory judgment praying that the Court determine that the contract of insurance issued by Petitioner afforded no coverage to Respondent on the claims asserted in the Complaints of O'Hara and Cook, and determining that Petitioner had no duty or obligation under said liability policy issued to West to defend on behalf of Respondent against said claims.

The District Court having ordered a trial on the issues joined on the Third Party Complaints and the Answers and Counterclaims thereto separate from, and in advance of, the trial of the issues joined on the Complaints of O'Hara and Cook and the Answers of The Pennsylvania Railroad Company thereto, the issues between Respondent and West and Petitioner came on for trial before the District Court without a jury.

The essential facts adduced at the trial are undisputed and appear in the Record at pages 44a-47a, 79a, 26a-28a, 37a. These undisputed facts may be summarized as follows:

> At the time of the accident in which O'Hara and Cook were injured there was in full force and effect a

certain policy of automobile liability insurance with four riders attached thereto which had been issued by Petitioner to L. A. West and in which the Respondent is a named insured; true and correct copies of said policy and said riders, marked "Exhibits 1, 1-B, 1-C, 1-D and 1-E" appear at pages 3b to 19b of the Record.

Coverage A of the Insuring Agreements of the policy in question obligated Petitioner "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury * * * sustained by any person, caused by accident and arising out of the hazards hereinafter defined." (Exhibit 1, page 2.) (Record page 5b.)

The Exclusions from the coverage appear on page 3 of Exhibit 1. In this exclusion clause we find the following:

"This policy does not apply:

"(a) * * *

"(b) * * *

"(c) * * *

"(d) under Coverage A, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law; or to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

"(e) under Coverage B, * * *

"(f) * * *"

The only rider that has any bearing upon the question in issue is Exhibit 1-B which extends the cover-

age afforded by the policy and creates an exception to the above-mentioned Exclusion (d); the pertinent portion of said Exhibit 1-B reads as follows (Record page 11b):

"The Company agrees:

"1. Under Coverage A, to pay on behalf of the New York Central Railroad Company and The Pennsylvania Railroad Company as their interest may appear, all sums which they shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, caused by accident, sustained by any of their employees including any employee of the New York Central Railroad Co., and The Pennsylvania Railroad Co., assigned to operate such vehicle, *while being transported to or from work* in or on any vehicle insured under this policy for Coverage A. (Emphasis added.)

"* * *

"This extended insurance for both Coverages A and B shall apply only while the automobiles insured under this policy are used for the purposes stated in Paragraph (1) of this Endorsement and under these circumstances only shall Exclusions (D) and (E) of the Policy become null and void; otherwise Exclusions (D) and (E) of the Policy shall remain in full force and effect."

On October 8, 1951, and prior thereto, O'Hara and Cook were employees of The Pennsylvania Railroad Company and were assigned to a track maintenance and repair crew. On October 8, 1951, O'Hara and Cook and other Railroad employees of the white race were quartered at the Railroad's camp site in Bucyrus, Ohio; employees of the negro race were quartered in "camp cars" at the Railroad's negro camp site at Upper Sandusky, Ohio. On the morning of that

day O'Hara and Cook left the "white" camp at Bucyrus and proceeded to Upper Sandusky where they reported for work at or prior to 8:00 A. M. Cook's duties at the time were those of a "camp overseer" and included the maintenance and repairs of the Railroad's camp cars, the driving of busses and miscellaneous duties; O'Hara's duties at the time included repair work, the driving of busses and assisting Cook. Shortly after reporting for work O'Hara and Cook were directed by the Railroad foreman to take one of its busses (the busses were owned by West and leased by him to the Railroad) and proceed to an abandoned camp site at Dunkirk, Ohio, for the sole purpose of procuring lumber, pipe couplings and other materials needed by the Railroad for the making of repairs to the camp cars at the negro camp site and to bring such materials back to such site. (Record pages 44a-47a, 79a.)

Pursuant to such orders, O'Hara and Cook obtained one of the bus vehicles described in the policy and proceeded to Dunkirk, Ohio, as directed. They obtained the required material, loaded it onto the bus and began the return trip to Upper Sandusky. While so returning, and at about 10:30 A. M. of that day, the bus left the road and collided with a house, as a result of which O'Hara and Cook were injured.

From the time of their reporting to work at their place of employment at Upper Sandusky, Ohio, up to and including the time of the accident, O'Hara and Cook were continuously engaged in the performance of the tasks and duties assigned to them that morning by their employer, the Railroad.

The District Court found that at the time of the accident O'Hara and Cook were then engaged in carrying out the particular tasks and duties that had been assigned them by the Railroad foreman and that they were not then "being transported to or from work" within the meaning of the contract of insurance, and accordingly held that the contract of insurance provided no coverage to the Respondent for its liability for the injuries so sustained by O'Hara and Cook. Findings of Fact and Conclusions of Law submitted by L. A. West and Petitioner were duly filed and were approved and adopted as the Findings of Fact and Conclusions of Law of the Court on June 3, 1954 (Record pages 26a, 37a) and judgment in favor of L. A. West and Petitioner was duly entered in each action on June 11, 1954. (Record page 38a.)

On appeal to the Court of Appeals for the Sixth Circuit, both cases were submitted and decided on the same record, pursuant to stipulation. The judgment entered by the District Court in each action was reversed, the Court of Appeals holding that Cook and O'Hara, "when making the return trip from Dunkirk to Upper Sandusky, they were making a trip from one job site to another." In effect the Court of Appeals held that even though Cook and O'Hara were engaged in the performance of the tasks and duties of their employment at the very moment of the accident, these men were nevertheless "being transported to or from work" within the meaning of the automobile liability policy issued by Petitioner to L. A. West.

REASONS FOR ALLOWANCE OF WRIT.

The Court of Appeals for the Sixth Circuit has decided an important state question in a way in conflict with applicable state law. It has decided an important question in a way in conflict with decisions of this Court, decisions

of the Courts of Appeals of other Circuits, and in conflict with its own decisions. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals, in holding the phrase "being transported to or from work" ambiguous has failed to give effect to the obvious intention of the parties as clearly expressed by the language employed; it has extended and enlarged, by implication and by misapplication of a rule of construction, the meaning of such phrase so as to embrace an insurance risk or hazard wholly foreign and distinct from that contemplated by the parties; and it has failed to give due regard and consideration to all the provisions of the insurance contract,—and particularly to the Insuring Agreements, the Exclusions and the whole of the Exception—in determining the meaning and intention of the phrase "while being transported to or from work." In so holding, the Court of Appeals has decided an important question in a way in conflict with applicable state law.

The Travelers' Insurance Co. v. Myers & Company, 62 Ohio St. 529, 57 N. E. 458 (1900);

Rose v. The New York Life Insurance Co., 127 Ohio St. 265, 187 N. E. 859 (1933);

Stickel v. Excess Insurance Co. of America, 136 Ohio St. 49, 23 N. E. (2nd) 839 (1939);

State Mutual Life Assur. Co. of Worcester vs. Briscoe, 107 F. (2d) 977 (6th Cir. Ohio) (1939).

The Court of Appeals in holding the phrase "to or from work" ambiguous has failed to accord to these words the meaning which such words clearly import when taken and understood in their plain, ordinary and popular sense; under the guise of construction, the Court of Appeals has

forced from plain, ordinary, unambiguous words unusual and unnatural meanings; it has created, and imported into the contract of insurance, an ambiguity which otherwise does not exist; and it has brushed aside the rule that an insurance company may contract for what accidents and risks it shall and shall not be liable, and the rule that provisions of a policy set forth in appropriate language, and upon which the premium calculations are based, should be maintained unimpaired by loose and ill-considered interpretations. In so holding, the Court of Appeals has decided an important question in a way in conflict with the decisions of this Court and the decisions of Courts of Appeals of other Circuits and indeed in conflict with its own Sixth Circuit decisions; and it has so far departed from the accepted and usual course of judicial construction as to call for the exercise of this Court's power of supervision.

Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 462 (1894);

Guarantee Company of North America v. Mechanics' Savings Bank and Trust Company, 183 U. S. 402, 418, 419, Certiorari allowed, 100 Federal Reports 559 (1902);

United States Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34, certiorari granted 280 U. S. 540, 31 F. (2d) 919 (6th Cir.) (1929) Ohio;

Bergholm v. Peoria Life Insurance Company, 284 U. S. 489, certiorari granted 284 U. S. 605, 50 F. (2d) 67 (5th Cir.) (1931);

Williams v. Union Central Life Ins. Co., 291 U. S. 170, certiorari granted 290 U. S. 613, 65 F. (2d) 240 (5th Cir.) (1933);

Kirby v. Federal Life Insurance Company, 35 F. (2d) 126 (6th Cir.) (1929);

Equitable Life Assur. Society of the United States v. Wells, 101 F. (2d) 608, 610 (6th Cir.) (1939);

Travelers Ins. Co. v. Springfield Fire & Marine Insurance Co., 89 F. (2d) 757, 762, 763 (8th Cir.) (1937);

Millers' Mutual Fire Insurance Association v. Warroad Potato Growers Association, 94 F. (2d) 741, 742 (8th Cir.) (1938);

Terry v. New York Life Insurance Co., 104 F. (2d) 498 (8th Cir.) (1939);

Lincoln National Life Insurance Co. v. Ghio, 111 F. (2d) 307 (8th Cir.) (1940).

The applicable Ohio law on the construction to be given insurance contracts is clear. The very early case of *The Travelers' Insurance Co. v. Myers & Company,* 62 Ohio St. 529 (1900) in the first syllabus says:

> "Policies of insurance should be construed, like other contracts, so as to give effect to the intention and express language of the parties. West et al. v. Citizens' Insurance Co., 27 Ohio St. 1, approved and followed."

This decision was followed by the case of *Rose v. The New York Life Insurance Co.,* 127 Ohio St. 265 (1933) syllabus number one of which reads:

> "Where the meaning of a contract of insurance against loss resulting from total and permanent disability can be fully and clearly ascertained from the words of the contract itself, the court may not resort to surrounding circumstances or the conduct of the parties for aid in its interpretation."

And in *Stickel v. Excess Insurance Co. of America,* 136 Ohio St. 49 (1939), we find syllabus number one:

> "A contract of reinsurance, like any other contract, should be construed so as to give effect to the inten-

> tion as expressed by the language of the parties. It cannot be extended or enlarged by implication to embrace an object distinct from that originally contemplated, *and all of its provisions should be construed together in determining the meaning and intention of any particular clause or portion thereof.*" (Emphasis added.)

And finally our Circuit Court of Appeals (Sixth Circuit) said in *State Mutual Life Assurance Co. of Worcester v. Briscoe,* 107 F. (2d) 977, on page 978:

> "All related provisions of the insurance contract are to be read to ascertain the meaning of any one. * * * courts are not at liberty to inject a new clause into the policy nor make a new contract for the protection of the insured * * *."

It is an accepted and usual, if not universal, rule of judicial interpretation that contracts of insurance are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense; and that all of the provisions within the four corners of the contract must be construed together in determining the meaning and intention of any particular clause. The rule that, in case of doubt as to meaning, contracts of insurance are to be strictly construed against the insurer, does not authorize a perversion of language, or the exercise of inventive powers for the purpose of creating an ambiguity where none exists, nor does it authorize the court to make a new contract for the parties or disregard the evidence as expressed, or to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties. Nor does such rule prevent the application of the principle that policies of insurance must receive a rea-

sonable interpretation consonant with the apparent object and plain intent of the parties.

In the case of *United States Fidelity & Guaranty Co. v. Guenther,* 31 F. (2d) 919, the Court of Appeals for the Sixth Circuit held the phrase "fixed by law" to be ambiguous, and then proceeded to apply the rule of construction which requires ambiguous terms to be construed in favor of the insured. The Court of Appeals accordingly held against the insurer and certiorari was sought. After granting certiorari, 280 U. S. 540, such ruling was reversed by this Court in *United States Fidelity & Guaranty Co. v. Guenther,* 281 U. S. 34. This Court, in holding that no rule of construction is necessary where the terms are clear, on page 37 recites:

> "In Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 462, this Court said: 'It is settled * * * that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured. *But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.*' " (Emphasis added.)

The question of construction of a term in an insurance policy was again before this Court by writ of certiorari in *Bergholm v. Peoria Life Insurance Company,* 284 U. S. 489, 50 F. (2d) 67 (5th Cir.) (1931). The Court on page 492 says:

> "It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. Mutual Life Ins. Co. v. Hurni Co., 263 U. S. 167, 174; Stipcich v. Insurance Co., 277 U. S. 311, 322. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; *but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction by forcing from plain words unusual and unnatural meanings.*" (Emphasis added.)

In the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever exclusions and exceptions they please on their obligations not inconsistent with public policy. Such policy contract must be construed to mean what it says. This approach is well settled and is set out very clearly in the case of *Williams v. Union Central Life Insurance Co.*, 291 U. S. 170, 65 F. (2d) 240 (5th Cir.) certiorari granted 290 U. S. 613. The eighth syllabus of the case reads:

> "While it is highly important that ambiguous clauses should not be permitted to serve as traps for policyholders, it is equally important, to the insured as well as to the insurer, that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered interpretations."

Further conflict with the instant ruling appears in the Sixth Circuit because of the rules of construction laid down by that court in the case of *Kirby v. Federal Life Insurance Company*, 35 F. (2d) 126 (1929). We quote from the syllabus:

"3. Parties to accident insurance contracts may contract for what accidents and risks the company shall and shall not be liable.

"4. Courts must accept language of accident insurance policy in its plain, popular, and ordinary sense.

"5. If policy is clear and unambiguous, courts have no authority to create an ambiguity."

It is submitted that due regard to the fundamental rules of construction governing insurance contracts, as announced in the cases above cited, and conformance with the accepted and usual course of judicial interpretation, would have avoided the error committed by the Court of Appeals in the instant case.

In holding that O'Hara and Cook while engaged in the performance of the tasks and duties assigned them by their Railroad employer—of hauling materials in a bus from Dunkirk to Upper Sandusky—were themselves being transported "to and from work", the Court of Appeals has in effect said that any employee whose work involves movement is going *from work and to work* all the time he is working. The holding of the Court of Appeals does violence to the plain, ordinary and popular sense meaning of the words "to or from work." The phrase "while being transported to or from work" is readily understood in its popular sense to mean "while being transported to the place where the employee is to enter upon the performance of the duties and tasks of his employment and while being transported therefrom at the completion of such duties and tasks." To permit any other meaning is to engage in the forming of a contract which the parties did not intend to make. To permit such construction as the Court of Appeals has indulged in would by necessity include coverage for injuries to employees at all times while

being transported in such vehicle—while going *to* work, while going *from* work and while *at* work. The inclusion of the words "to and from work" in the phrase "while being transported to or from work in or on any vehicle" was obviously, and necessarily, for the purpose of limiting the coverage under the Exception to something less than would be the case if the words "to or from work" had been omitted from such phrase. Yet the meaning given by the Court of Appeals to the phrase "while being transported to or from work in or on any vehicle" is exactly what would be the case if the words "to or from work" had been omitted and the phrase drafted to read "while being transported in or on any vehicle."

By the terms of Exclusion (d) of the Policy (Exhibit 1) there is excluded from the liability coverage "bodily injury * * * of any employee of the insured while engaged in the employment * * * of the insured" whether such injury be sustained by the employee while riding in or on the insured vehicle or is otherwise sustained. Unamended, Exclusion (d) excludes from the coverage any bodily injury to any such employee while riding in or on the insured vehicle *under any circumstances*—while going to work, while going *from* work, or while *working*. It is significant to note that the exception engrafted upon Exclusion (d) did not release from the Exclusion all employees engaged in the employment of the insured who might be riding in the insured vehicle, but only such as are at any given time "being transported to or from work." By using the qualifying words "to or from work", it is clear that the parties intended to continue in effect the exclusion from coverage of those employees who might be riding in the vehicle under the only other circumstance possible, to-wit: while such employees are actually "at work" carrying out the performance of the tasks assigned them.

By its construction the Court of Appeals has emasculated the words "to or from work." It has construed the phrase "while being transported to or from work in or on any vehicle" as if the words "to or from work" had been omitted altogether; and the Court of Appeals has thereby violated a fundamental rule of construction that effect must be given to the obvious purpose and intent of a qualifying or limiting phrase or clause.

The plain and simple, ordinary and popular sense, meaning of the words "to or from work" is obvious. To permit the interpretation given to these words by the Court of Appeals would eliminate the very limitation which the words "to or from work" were intended to impose, and would entirely frustrate and defeat the very purpose—the only purpose—the contracting parties could possibly have had in mind when they adopted such words of limitation. To permit such interpretation is to allow the court to make a new contract for the parties with terms and conditions which the parties clearly did not contemplate.

WHEREFORE it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit should be granted.

WAYNE E. STICHTER,
Attorney for Petitioner.

EASTMAN, STICHTER & SMITH,
240 Huron Street, Toledo, Ohio,
Of Counsel.

APPENDIX.

OPINION OF THE DISTRICT COURT IN CASES NUMBERS 6878 AND 6910.

(May 5, 1954.)

KLOEB, *J.*

Counsel for the third-party defendants have submitted two citations that the Court feels are in point. I don't know that we have anything in Ohio exactly in point.

The first is the case of *Seaman vs. Rindge, Kalmbach, Logie & Company*, from the Supreme Court of Michigan, found in 161 Northwestern Reporter, at page 919.

Paragraph 4 of the syllabus:

> "A mortgagor being informed in time to protect himself of the mortgagee's breach of agreement to take out a fire policy protecting him, it was his duty, under the rule of avoidable consequences, to do so; so that, failing therein, he could not recover as damages the loss from fire."

That is exactly on the nose here. That is from the Supreme Court of Michigan, dated March 30, 1917, and is in line with the pronouncements found in some of the general references such as *Corpus Juris Secundum.*

There is the case of *Bentley et al. vs. Fayas et al.*, found in 50 Northwestern 2d Series, at page 404, from the Supreme Court of Wisconsin, dated December 4, 1951,

> "Action by Warren Bentley, and others, against Henry Fayas and others, for personal injuries sustained when truck owned by defendant Fayas ran off road while carrying the plaintiffs, as cherry pickers, to orchards of the Reynolds Preserving Company. The Reynolds Preserving Company was interpleaded as a defendant, and defendant Fayas cross-complained against Reynolds on ground of alleged contract by Reynolds

> to provide defendant Fayas with liability insurance which would protect him against claims of plaintiff pickers. The Circuit Court for Brown County, Edward M. Duquaine, J., entered judgment that Reynolds should occupy position of insurer, and Reynolds appealed. The Supreme Court, Currie, J., held that representation by agent of orchard operator that endorsement on fleet policy carried by orchard operator would cover pickers, even if legally untrue, was mere innocent misrepresentation of law and not of fact, and was not actionable, * * *."

You have the same situation here: you are attempting to get an oral opinion as to what Mr. West stated he thought his automobile liability policy covered.

> "* * * and that the liability of one who breaches contract to procure insurance for benefit of another, is to pay damages, and is not that of an insurer."

Well, what would be the damages? Probably the cost of an insurance policy. I would think so. So that even if you succeed in keeping Mr. West in here you are not going to be able to hold him in the amount that Cook and O'Hara might recover in a suit. I make that preliminary statement because I want you to understand what the Court is thinking with regard to the position Mr. West occupies here.

The policy of insurance that was issued early in 1951, and was to continue throughout the year and was in effect on October 8, 1951, the date of these injuries, is a public liability and property damage policy covering the operation of motor vehicles, and to that extent it complies with the requirement in the contract that was entered into in 1949, which required Mr. West to procure a public liability and property damage insurance policy. He did that.

Supplementing the policy, there was attached to it Exhibit 1-A, which in turn was clarified somewhat by Exhibit 1-B, but not insofar as the pertinent provisions here are concerned.

Under Paragraph 1 of Exhibit 1-B we find this:

> "Under Coverage A, to pay on behalf of the New York Central Railroad Company and the Pennsylvania Railroad Company as their interest may appear, all sums which they shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, caused by accident, sustained by any of their employees including any employee of the New York Central Railroad Company, and the Pennsylvania Railroad Company, assigned to operate such vehicle, while being transported to or from work in or on any vehicle insured under this policy for Coverage A."

The question is, were Mr. Cook and Mr. O'Hara being transported to or from work in a vehicle covered by this insurance policy on October 8, 1951, at the time that they met with these personal injuries?

The record discloses, from the stipulation as well as from the other evidence we have in the record, that these two men had been transported from Bucyrus to Upper Sandusky in the early morning of October 8, 1951. Clearly, the policy covered that activity. If these men had been injured as employees of the railroad company while being transported in this bus from Bucyrus to Upper Sandusky, where they were to go to work early that morning, the policy would have covered that situation, in the opinion of the Court. But, having arrived at Upper Sandusky, they were assigned by Mr. Klinefelter the duty of taking the bus and going to Dunkirk and there obtaining some hose and fittings and some lumber which they had pre-

viously ascertained would be necessary to make some needed repairs on the cars at Upper Sandusky.

They went there. They found that the lumber was not there that they had gone for, but they did pick up certain hose connections and fittings which were to be applied to the cars at Upper Sandusky, and they put those in the bus and started back. It was while they were on their way back that this accident occurred.

Were they being transported to or from work at that time? I think the answer must be no. They were engaged in work at that time; they were at work. They were at work in the business of transporting from Dunkirk to Upper Sandusky certain materials that they had been sent there to procure by their superior, Mr. Klinefelter, that they were to return with.

Clearly, under the exceptions here the policy of insurance was not applicable.

Mr. Gipe and Mr. Riser had this policy before them, together with Exhibit 1-A and Exhibit 1-B, or at least Mr. Gipe had it before him in the early part of 1951, for the purpose of examination. He said it was his duty to so examine the policy, and he knew what the policy covered and made no objection thereto. So that the Court fails to see where the defendant, The Travelers Insurance Company, is bound under this contract of insurance to supply a defense for the Pennsylvania Railroad Company and to pay any damages that may be awarded as the result of personal injuries to Mr. Cook and Mr. O'Hara.

By the same token, the Court fails to see where Mr. West can properly be retained as a party-defendant. Mr. West did what his contract required him to do, assuming we mean by that the written contract of 1949, and there has been no proof whatever that that written contract was extended by oral agreement to and during the year

1951. But assuming that such an oral agreement was in existence and that the terms of that contract of 1949, the written contract, are to be judged, what was Mr. West to procure? A policy of automobile liability insurance. That he did. Wherein is he at fault?

Now, assuming again that Mr. West may have said, "Well, yes, this policy covers the activities of the employees of the Pennsylvania Railroad." That statement would be true. It covered the activities of the employees of the Pennsylvania Railroad while being transported to and from work, which meant the labor crews that were being transported from one spot to another.

The same contract required the Pennsylvania Railroad Company to provide liability insurance, general liability insurance, in the sum of $25,000.00 to $50,000.00. I assume they lived up to their contract and provided such insurance. I don't know. That is immaterial.

I think the motion ought to be sustained for the reasons stated, and that the prayer in the Answers ought to be recognized, and that the defendants, The Travelers Indemnity Company and L. A. West, be dismissed as parties-defendant.

Findings of Fact and Conclusions of Law may be drafted accordingly and filed within ten days. If the railroad has any exceptions or suggested additions thereto, it may file them within five days thereafter.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Cases Numbers 12355 and 12356.

Decided October 19, 1955.

Before ALLEN, MARTIN and STEWART, Circuit Judges.

MARTIN, Circuit Judge. The Pennsylvania Railroad Company has appealed from an order of the United States District Court adjudging that there is no legal obligation upon the Travelers Insurance Company, under a certain policy of insurance, to defend on behalf of the railroad company against claims asserted against the carrier by two of its employees, Cook and O'Hara. The order adjudged further that there is no duty or obligation upon the insurance company to pay, in whole or in part, any judgment that these two employees may recover against the railroad company for damages sustained by them arising out of a bus accident on October 8, 1951, or any costs or expenses incurred by the railroad company in connection with its defense or settlement of the claims.

Cook and O'Hara brought separate actions against the Pennsylvania Railroad Company under the Federal Employers Liability Act. They allege that, at the time of their injury, they were performing their duties with the repair and maintenance crew of the railroad company. The carrier filed third-party complaints against an individual, L. A. West, and the Travelers Insurance Company. A contract was in existence between West and the railroad company, under which West agreed to procure and maintain automobile liability insurance on vehicles leased by him to the railroad company during specified operations which were under way at the time of the accident. The pertinent clause of this policy of insurance provided, *inter alia*, that the Travelers would pay, on behalf of the railroad

company, all sums which the carrier should become legally obligated to pay as damages resulting from bodily injury caused by accident sustained by any of the railroad company's employes "while being transported to or from work in or on any vehicle insured" under the policy.

Vehicles insured under the policy were buses and trucks owned by L. A. West and leased by him to the Pennsylvania Railroad Company. The bus involved in the accident in which Cook and O'Hara were injured was included in the coverage of the policy and was in possession of the railroad company and operated exclusively by it and its employees.

On October 8, 1951, Cook and O'Hara, and other supervisory personnel, were quartered at a railroad camp site at Bucyrus, Ohio. The rest of the track maintenance and repair crew was quartered at a railroad camp site at Upper Sandusky, Ohio. For several months prior to and inclusive of that date, Cook had been acting as camp overseer. His duties included general maintenance and repair of camp cars, preparation of noon lunches for supervisory personnel, and driving of buses. For a like period, O'Hara had performed miscellaneous duties, including those of track repairman, bus driver, and machine operator. During the same interim, Klinefelter had served as general foreman of the track maintenance and repair crew and, in that capacity, was authorized to assign members of the crew to particular duties.

Before October 8, 1951, the date of the accident, the two railroad camps had been moved respectively from Dunkirk to Upper Sandusky, and from Ada to Bucyrus. The camp at Upper Sandusky was located on the railroad right-of-way and embraced some railroad cars which were used as living quarters for the crew. Other cars were used for kitchen and dining purposes. Wooden frames

and screens had been constructed and used between the dining cars and the kitchen cars at the Dunkirk camp site. When the cars were moved from Dunkirk to Upper Sandusky, this screening equipment was dismantled and removed. Upon establishment of the camp at Upper Sandusky, it was observed that the wooden frames and the screening equipment were missing.

On the morning of October 8, Cook and O'Hara reported for work at the Bucyrus camp site. From there, they proceeded in buses owned by West and leased to the railroad to the Upper Sandusky camp site, where each picked up labor personnel housed there and drove the workers to the job site a mile and a half or two miles away.

After the laborers had been transported to the job site, General Foreman Klinefelter ordered Cook and O'Hara to drive one of the leased buses to the former camp site at Dunkirk, to pick up the wooden frames and the screening equipment left there and bring them to the camp site at Upper Sandusky, and to install them between the kitchen and dining cars at the new camp site. O'Hara was ordered to accompany Cook on the trip and to assist in the performance of the work assignment. The two men proceeded directly to Dunkirk, with Cook driving the bus. On arriving there, they did not find the screen equipment, but did find air hoses, pipe couplings, and pipe fittings, all of which were placed in the bus for use in the repair and maintenance of the new camp. With Cook at the wheel, the two men then started in the bus by the most direct route to the Upper Sandusky camp site. At about ten-thirty o'clock in the morning, while they were thus riding, Cook and O'Hara were injured in a roadway accident.

After conducting a hearing, at which evidence was received, the district court, in an oral opinion delivered

from the bench, decided that at the time of the accident Cook and O'Hara were not being transported to or from work within the meaning of the Travelers Insurance Company policy covering the liability of the Pennsylvania Railroad Company. The judge stated that, if the men had been injured while being transported in the bus from Bucyrus to Upper Sandusky, where they were to go to work early that morning, the policy would have covered; but that, at the time of the accident, they were "at work" and were not being transported to or from work.

We think this finding is clearly erroneous. By his holding, the district judge construed the ambiguous terms of the policy strictly in favor of the insurer rather than in favor of the insured, as the law demands where there is ambiguity in a policy of insurance. In *Bobier v. National Casualty Company,* 143 O. S. 215, 54 N. E. (2d) 798, an excellent and soundly reasoned opinion was written by Judge Bell stating the principle that, in case of ambiguity in the language used by the insurer in an indemnity insurance policy, the language will be construed most favorably to the insured. In the third syllabus to this case, the Supreme Court of Ohio held that, where an insurer "drafts and issues an automobile indemnity policy, providing therein for insurance against liability resulting from injury to or destruction of property, arising out of the ownership, maintenance or use of an automobile including loading and unloading thereof, but fails to define in the policy what shall constitute 'loading and unloading,' such phrase is ambiguous and will be given the construction most favorable to the insured." See also *American Policy Holders Insurance Company v. Michota,* 156 O. S. 578, 103 N. E. (2d) 817. This court has said: "If two constructions may reasonably be employed, the courts uniformly enforce the one favorable to the assured."

[Citing cases.] *Preferred Acc. Ins. Co. v. Rhodenbaugh*, 160 F. (2d) 832, 836 (C. A. 6).

It is important to observe that the Supreme Court of Ohio has held that the "duty of a liability insurance company under its policy to defend an action against its insured is determined from the plaintiff's petition, and when that pleading brings the action within the coverage of the policy of insurance, the insurer is required to make defense regardless of its ultimate liability to the insured." *Socony Vacuum Oil Company v. Continental Casualty Co.*, 144 O. S. 382, 59 N. E. (2d) 199 (first syllabus). See also *Bloom-Rosenblum-Kline Co. v. Union Indemnity Co.*, 121 O. S. 220, 167 N. E. 884; and *London Guarantee and Accident Co. v. Shafer*, 35 F. Supp. 647 (S. D. Ohio), citing the Ohio authority just mentioned.

Apparently, the district judge considered that the words in the policy, "to and from work," meant a specific trip in the bus from the camp site to the job site. These words, however, are not defined in the policy; and the interpretation given them by the district court would, in our opinion, be strictly against the insured and in favor of the insurer. If the insurer had intended the limited construction, it should have put definitive words into the policy issued by it. The trial court based its interpretation of the policy terms upon the fact, as it stated, that Cook and O'Hara were already "at work" at the time of the occurrence of the accident and that they could not be going to and from work if they were actually "at work." If this were a correct interpretation, there would be small coverage supplied the Pennsylvania Railroad by the policy, for its employees could just as reasonably be said to be "at work" when they boarded the buses at the Bucyrus camp site.

We think that the correct interpretation of the policy is that, when making the trip to Dunkirk, they were traveling in the bus to a job site and that, when making the return trip from Dunkirk to Upper Sandusky, they were making the trip from one job site to another. Such interpretation conforms to the accepted rule of liberal interpretation which has been discussed. We have been referred to no authority construing the phrase, "being transported to or from work," but we think, as appellant contends, that the following cases, decided by the Supreme Court of Ohio or by this court, support the conclusion which we have reached. *Wood v. Vona,* 147 O. S. 91, 100, 101, 68 N. E. (2d) 80; *Leonard v. Murdock,* 147 O. S. 103, 108, 109, 68 N. E. (2d) 86; *Mitchell, Adm'x, v. Great Eastern Stages, Inc.,* 140 O. S. 137, 142, 42 N. E. (2d) 771; *Constitution Indemnity Co. v. Lane,* 67 F. (2d) 433, 435 (C. A. 6); *Employers Liability Assurance Corp. v. Accident and Casualty Insurance Co.,* 134 F. (2d) 566, 569 (C. A. 6); *Fidelity & Casualty Co. of New York v. Standard Oil Co.,* 162 F. (2d) 715 (C. A. 6), per curiam affirmance of 66 F. Supp. 603 (W. D. Ky.; Shelbourne, D. J.); *St. Paul-Mercury Indemnity Co. v. West Michigan Dock & Market Corp.,* 179 F. (2d) 242 (C. A. 6), per curiam affirmance of 82 F. Supp. 403 (W. D. Mich.; Starr, D. J.).

The order of the district court is reversed; and the cause is remanded for further proceedings in conformity with this opinion.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS—Case No. 12,355.

(Filed October 19, 1955.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby reversed; and the cause remanded to the District Court for further proceedings in conformity with the opinion herein.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS—Case No. 12,356.

(Filed October 20, 1955.)

In this cause, the order of the district court is reversed; and the cause is remanded for further proceedings in conformity with an opinion filed on October 19, 1955, in companion Cause No. 12,355, The Pennsylvania Railroad Company v. The Travelers Insurance Company; a stipulation having been entered by and between appellant and appellee in the cases that "all the original papers and Clerk's Statement of Relevant Docket Entries filed in the companion case * * * No. 12,356, on the docket of this court shall, for the purposes of this appeal, be considered as having been filed in this cause also, and shall have the same force and effect as if actually filed in this appeal"; and "that the briefs to be filed by Appellant and Appellee in connection with the appeal" in Cause No. 12,355 "and in Cause No. 12,356 shall be filed only in" Cause No. 12,355, "but shall, for the purposes of the appeal in Cause No. 12,356, be considered as having been filed in said Cause No. 12,356 also."

The two causes having been considered together, therefore, the opinion filed in No. 12,355 is considered to have been filed in this cause (No. 12,356), as well.

It is so ordered.

Office - Supreme Court, U. S.
FILED
FEB 13 1956
HAROLD B. WILLEY, Clerk

No. 623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

THE TRAVELERS INSURANCE COMPANY,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROSS W. SHUMAKER
240 Huron Street
Toledo, Ohio
Attorney for Respondent

HUMAKER, LOOP & KENDRICK
240 Huron Street, Toledo, Ohio
Of Counsel.

URT INDEX PRESS, INC. — Law Printers — 629 Walnut St., Cincinnati, O.

SUBJECT INDEX

	Page
RESTATEMENT OF QUESTION PRESENTED FOR REVIEW	1
SUPPLEMENTAL STATEMENT OF THE CASE	2
A. Developments in Courts Below	2
B. Undisputed Facts	3
ARGUMENT	
A. There is No Federal Question Involved	6
B. The Ohio Law Requires a Construction Strictly Against the Insurance Company	7
C. This Policy Provision is Ambiguous	10
CONCLUSION	13

TABLE OF CASES

American Policyholders Ins. Co. vs. Michota, et al., (1952) 156 O.S. 578; 103 N.E. (2d) 817 ..... 7, 8
Aschenbrenner vs. United States Fidelity & Guaranty Co. (1934) 292 U.S. 80, 84-85 7
Bobier, d/b/a Federal Appliance Service Co. vs. National Casualty Co., (1944) 143 O.S. 215; 54 N.E. (2d) 798 ..... 7, 11
Erie Rd. Co. vs. Tompkins (1938) 304 U.S. 64, 78 6
Fidelity & Deposit Co. of Maryland vs. Friedlander (6 Cir. 1939) 101 F. 2d 106 10
Griffin, Adm. vs. McCoach, Trustee (1941) 313 U.S. 498, 504, et seq. 6
Keehn, Recr. vs. Hodge Drive-It-Yourself, Inc. (1945) 146 O.S. 45, 52; 64 N.E. (2d) 117 ..... 6, 7
Pink, Supt., etc. vs A.A.A. Highway Express, Inc., et al. (1941) 314 U.S. 201, 208-209 ..... 6, 7
Preferred Acc. Ins. Co. vs. Rhodenbaugh (6 Cir. 1947) 160 F. (2d) 832 .....7, 8-9, 10
Stipcich vs. Metropolitan Life Ins. Co. (1928) 277 U.S. 311, 322 ..... 7, 8, 10
Stroehmann vs. Mutual Life Ins. Co. of N. Y. (1937) 300 U.S. 435, 439 ..... 7, 8
Travelers Indemnity Co. vs. Pray (6 Cir. 1953) 204 F. 2d 821 10

In the

SUPREME COURT OF THE UNITED STATES

No. 623

THE TRAVELERS INSURANCE COMPANY,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

In a counterclaim by the insurer, Travelers Insurance Company, against its insured, The Pennsylvania Railroad Company, seeking a construction of the clause "while being transported to or from work", as contained in an indemnity endorsement to a liability insurance policy in effect between the parties, did the Court of Appeals properly find more than one reasonable interpretation of this clause, thus requiring the application of the construction most favorable to the insured?

SUPPLEMENTAL STATEMENT OF THE CASE

A. Developments in Courts Below

This controversy arose when Travelers Insurance Company refused to assume the defense of two Federal Employers Liability actions filed against its insured, The Pennsylvania Railroad Company.

The insurance policy involved (R. 19a) was an automobile liability policy which Travelers Insurance Company issued to cover buses used by The Pennsylvania Railroad Company. The Pennsylvania Railroad Company was a named insured (R. 21a). The policy provided indemnity coverage for The Pennsylvania Railroad Company from any liability to which it might be exposed as a result of its employees being injured while being transported *"to or from work"* in or on any vehicle insured under the policy. (R. 20a).

Cook and O'Hara, employees of the insured, were members of the track repair and maintenance crew and, on October 8, 1951, were traveling in one of the buses to Upper Sandusky, Ohio where they were to perform work as assigned by their foreman. During the trip, the bus left the highway, struck a farmhouse and both men were injured. They filed suits in the District Court under the Federal Employers' Liability Act against The Pennsylvania Railroad Company. When Travelers Insurance Company refused to defend these actions, The Pennsylvania Railroad Company filed third party complaints against Travelers Insurance Company and the owner of the bus seeking indemnity against any judgments which might be rendered in the personal injury suits. (R. 6a-10a)

Travelers Insurance Company filed an Answer and Counterclaim denying coverage under the policy and seeking a declaratory judgment that coverage did not extend

to include employees injuries under the facts of the particular accident and that it had no duty to defend. (R. 11a-17a)

The District Court ordered a non-jury trial of the insurance coverage issue separately from, and in advance of the trial of the issues raised in the original complaints. That Court construed the policy provisions so as to exclude coverage under the circumstances of the accident. (R. 38a-39a)

The Court of Appeals for the Sixth Circuit, in a unanimous opinion, reversed the District Court and held (1) that the policy terms were ambiguous; (2) that the Ohio law required an interpretation of the ambiguity liberally in favor of the insured; and (3) that the terms of the policy provided coverage for the insured under the circumstances of the accident. (Petition 28-29; Opinion, Petition 22-27)

B. Undisputed Facts

It is agreed that no dispute of fact exists between the parties, as all the material facts were stipulated before trial and were read into the record in the District Court. (R. 44a-47a) (Petition, 3)

While the summary of facts stated in the Petition is substantially correct, Petitioner has neglected to emphasize certain important facts and has overlooked others. We therefore supplement the statement of facts as follows:

1. The endorsement (Ex. 1-B; R. 20a) extending coverage to The Pennsylvania Railroad Company against damages because of bodily injuries to its employees is an *indemnity agreement* running from Travelers Insurance Company to its insured and is not "an exception to an exclusion clause" as claimed in Petitioner's statement of the question presented. (Petition, 2)

2. Said endorsement (Ex. 1-B; R. 20a) specifically provides that its provisions are controlling over any other provisions of the policy which are inconsistent with it.

3. There were four different camp sites and one repair work site reported in the stipulated facts. (R. 45a) These were the former camp sites of the repair and maintenance crew at Dunkirk and Ada, Ohio, and the new camp sites at Bucyrus and Upper Sandusky, Ohio. The crew had worked out of the existing camp sites for several days prior to the accident on October 8, 1951. (R. 45a) The construction or repair work site along the Pennsylvania tracks was located about one and a half or two miles east of the Upper Sandusky camp site. (R. 46a)

4. Cook and O'Hara had various work assignments to perform with the track maintenance and repair crew. Cook was the camp overseer and had charge of the railroad cars, fixing water pipes, screens, windows and general maintenance and repair of the camps, the preparation of noon lunches for the foremen and machine operators, driving of buses, and the running of errands. (R. 45a) O'Hara's work comprised that of track repairman, bus driver, machine operator and miscellaneous duties to which the foreman might assign him. (R. 45a)

5. The Upper Sandusky camp consisted of railroad cars which were used as living quarters for the laboring members of the crew and the Bucyrus camp housed the supervisory personnel. Certain of the cars in the Upper Sandusky camp were kitchen and dining cars and, when that camp was located at Dunkirk, wooden frames and screening were erected between the cars for sanitary purposes. (R. 45a, 46a) When this camp was moved from Dunkirk to Upper Sandusky, the screening equipment was dismantled for the purpose of making the trip. Upon setting up the camp at Upper Sandusky it was discovered that this equipment had not been transported to the new camp site. It was necessary, therefore, to procure this equipment. (R. 46a)

6. Cook and O'Hara commenced the day's work on October 8, 1951 when they left their camp at Bucyrus and proceeded in one of the buses to the Upper Sandusky camp. Each of them picked up a group of the laboring personnel and transported them in buses to the job site along the tracks which was about two miles east of the Upper Sandusky camp. (R. 46a)

7. Foreman Klinefelter then ordered Cook and O'Hara to take one of the buses customarily used in connection with such operations of the crew and to proceed to the former camp site at Dunkirk to procure the equipment which had been left there and to bring it to the camp site at Upper Sandusky and to install it. (R. 46a)

8. When Cook and O'Hara arrived at Dunkirk they did not find the screening equipment, but did find air hoses, pipe couplings and pipe fittings which were required at the camp sites, so they loaded these into the bus and drove by the most direct route toward the Upper Sandisky camp. They were on their way to perform the work assigned to them by Foreman Klinefelter when the accident occurred resulting in their inquries. (R.47a)

Upon the facts as stipulated and upon the policy provisions as admitted, the issue of insurance coverage was tried to the District Court, without a jury. That Court interpreted the phrase "to or from work" to be limited to particular bus trips from a camp site to a job site and return. (R. 83a) However, the Court of Appeals, in a unanimous opinion, held that the finding of the District Court was "clearly erroneous" because in so holding, the District Court had "construed the ambiguous terms of the policy strictly in favor of the insurer rather than in favor of the insured * * *". (Petition, page 25) The Court of Appeals interpreted the phrase "to or from work" to include transporation from one work site to another during the course of the work day.

ARGUMENT

Three simple propositions of law demonstrate the correctness of the decision of the Court of Appeals. (1) This is an Ohio contract to be construed under the state law and no federal question is involved. (2) The settled Ohio law requires a construction strictly against the insurance company. (3) The policy provision is ambiguous and the Court of Appeals correctly applied the Ohio law in construing it.

A. There is no Federal Question Involved

This case involves nothing more than the interpretation of an insurance contract. The contract was made in Ohio, to be performed in Ohio. No Federal constitutional or statutory provision is involved. Therefore, the State law controls its interpretation. Such conclusion, we believe, is inescapable under the decisions of this court.

Erie Rd. Co. v. *Tompkins* (1938) 304 U.S. 64, 78
Griffin, Admr. v. *McCoach, Trustee* (1941) 313 U.S. 498, 504, et seq.
Pink, Supt., etc. v. *A.A.A. Highway Express, Inc., et al.* (1941) 314 U.S. 201, 208-209
Keehn, Recr. v. *Hodge Drive-It-Yourself, Inc.* (1945) 146 O.S. 45, 52; 64 N.E. (2d) 117

In the case of *Erie Rd. Co.* v. *Tompkins*, supra, this court held that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." In the case before the court, neither Federal Constitution nor statute is relied upon by either party.

And, in the case of *Pink, Supt., etc.* v. *A.A.A. Highway Express, Inc., et al.*, supra, this Court held that the local law controlled the construction of a motor vehicle liability

insurance policy issued by a foreign insurance corporation to local residents. This same proposition, partly on the authority of the *Pink* case, supra, was recognized as the law of Ohio in the case of *Keehn, Recr.* v. *Hodge Drive-It-Yourself, Inc.*, supra. As stated in the syllabus by the Ohio Supreme Court, the rule is as follows:

> "2. A contract of insurance issued and to be performed in Ohio by a foreign or alien mutual insurance company authorized to do business in this state to a policyholder resident of this state will be construed and enforced in accordance with the laws of Ohio."

We believe there can be no serious disagreement that the law of Ohio controls the construction of this contract. In fact, this is inferentially conceded by the petition before the court.

B. The Ohio Law Requires a Construction Strictly Against the Insurance Company

It is the law of Ohio (in direct agreement with the decisions of this Court) that an ambiguous insurance contract must be construed liberally in favor of the insured and strictly against the insurer.

American Policyholders Ins. Co. v. *Michota, et al.*, (1952) 156 O.S. 578; 103 N.E. (2d) 817

Bobier, d/b/a Federal Appliance Service Co. v. *National Casualty Co.*, (1944) 143 O.S. 215; 54 N.E. (2d) 798.

Stroehmann v. *Mutual Life Ins. Co. of N. Y.* (1937) 300 U.S. 435, 439

Aschenbrenner v. *United States Fidelity & Guaranty Co.* (1934) 292 U.S. 80, 84-85

Stipcich v. *Metropolitan Life Ins. Co.* (1928) 277 U.S. 311, 322

Preferred Acc. Ins. Co. v. *Rhodenbaugh* (6 Cir. 1947) 160 F. (2d) 832

The above stated rule of construction is practically universal and certainly is the law of Ohio as defined by the highest court in that state. The rule is summarized in paragraph one of the syllabus of the *Michota* case, supra, as follows:

> "1. Policies of insurance which are in language selected by the insurer and which are doubtful or ambiguous in their meaning will be construed most favorably to the insured."

The cited Ohio decisions are in exact agreement with the previous holdings of this Court. In the case of *Stroehmann* v. *Mutual Life Ins. Co. of N. Y.*, supra, this Court quoted one of its earlier decisions in the following terms at page 439 of its opinion:

> "In *Mutual Life Insurance Co.* v. *Hurni Packing Co.*, 263 U.S. 167, 174, this Court said: 'The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it.'"

And in the *Stipcich* case, supra, this Court said at page 322 of its opinion:

> "But narrow and unreasonable interpretations of clauses in an insurance policy are not favored. They are prepared by the insurer and *if, with equal reason, open to two constructions,* that most favorable to the insured will be adopted." (Emphasis added)

This is the rule which has been applied and followed in the Sixth Circuit as evidenced by the *Rhodenbaugh* case, supra. In that case, the Court stated at page 836 of the opinion as follows:

> "If two constructions may reasonably be employed, the courts uniformly enforce the one favorable to the assured."

It was this law that the Sixth Circuit Court of Appeals applied and followed in its determination of the instant case. In the unanimous opinion of the Court of Appeals (Petition, page 22, 25) it is stated as follows:

> "In *Bobier* v. *National Casualty Company*, 143 O.S. 215, 54 N. E. (2d) 798, an excellent and soundly reasoned opinion was written by Judge Bell stating the principle that, in case of ambiguity in the language used by the insurer in an indemnity insurance policy, the language will be construed most favorable to the insured. In the third syllabus to this case, the Supreme Court of Ohio held that where an insurer 'drafts and issues an automobile indemnity policy, providing therein for insurance against liability resulting from injury to or destruction of property, arising out of the ownership, maintenance or use of an automobile including loading and unloading thereof, but fails to define in the policy what shall constitute "loading and unloading," such phrase is ambiguous and will be given the construction most favorable to the insured.' See also *American Policy Holders Insurance Company* v. *Michota*, 156 O.S. 578, 103 N.E. (2d) 817. This court has said: 'If two constructions may reasonably be employed, the courts uniformly enforce the one favorable to the assured.' [Citing cases] *Preferred Acc. Ins. Co.* v. *Rhodenbaugh*, 160 F. (2d) 832, 836 (C.A. 6)."

The Ohio law stating the rules for the construction of insurance contracts is clear and is well settled. The decisions quoted above set out this law without equivocation or confusion. There is no conflict between the Ohio doctrine on this subject and the legal principles applied by this Court in other cases. And the same rule of construction

was followed by the Court of Appeals in interpreting the contract clause in issue.*

C. This Policy Provision is Ambiguous

The petitioner suggests that the problem herein is to determine which interpretaion of the policy is correct. However, the problem is not nearly so difficult. The law merely requires that when policy terms are open to more than one reasonable interprtation, then the interpretation most favorable to the insured must be adopted by the court. *Stipcich* v. *Metropolitan Life Ins. Co.*, supra; *Preferred Accident Ins. Co.* v. *Rhodenbaugh*, supra. Thus, when the Court of Appeals saw that another construction could be reached with "equal reason" it was required to adopt the interpretation most favorable to the insured.

The fact that the two courts below reached different conclusions as to the meaning of this provision demonstrates its ambiguity.

The respondent recognizes that the insurance company might have intended to state and further define in the terms of its policy exactly what the District Court interpreted the policy provisions to mean. The reasoning of the District Court is logical as far as it goes. But on the other hand, there is good basis in reason, and probably better, for the interpretation which the Court of Appeals has placed on the terms of this policy. What the Court of Appeals did is evidenced by the statement made in that Court's opinion (Petition, page 25) as follows:

> "If two constructions may reasonably be employed, the courts uniformly enforce the one favorable to the assured."

---

* **See also, Fidelity & Deposit Co. of Maryland vs. Friedlander (6 Cir. 1939) 101 F. 2d 106. Travelers Indemnity Co. vs. Pray (6 Cir. 1953) 204 F. 2d 821**

In so doing, the Court of Appeals followed the Ohio case of *Bobier* v. *National Casualty Company*, supra, which is directly applicable to the facts involved in the instant case. The insurance policy in that case covered liability for damage caused by the insured during "loading and unloading" of the insured's trucks. The evidence disclosed that the insured's employees damaged the hallway of plaintiff's premises while carrying a stove into plaintiff's building after the stove had been unloaded from the insured's truck.

The Supreme Court of Ohio held that the term "unloading" could reasonably be interpreted to extend to the actual delivery of the shipment into the customer's premises, particularly where the insurance company, which drafted the policy, did not attempt to limit or define in the policy what shall constitute "loading and unloading". The rule is summarized in paragraph 3 of the syllabus of the *Bobier* case, supra, at page 215 as follows:

> "3. Where an insurer drafts and issues an automobile indemnity policy, providing therein for insurance against liability resulting from injury to or destruction of property, arising out of the ownership, maintenance or use of an automobile including loading and unloading thereof, but fails to define in the policy what shall constitute 'loading and unloading', such phrase is ambiguous and will be given the construction most favorable to the insured."

The same rule of interpretation is applicable to the instant case. The policy did not limit or define the term "to or from work." If Travelers had intended to limit coverage to particular transportation trips to and from work as distinguished from many others, then it should have specifically defined the limitations in the terms of the policy. It failed to do so, and the term must, therefore, be interpreted to include the varied trips from one work site to another.

Cook and O'Hara had many different work assignments and those would take them to several different locations. The same would be true of the entire track repair and maintenance crew. This is the "work" which was obviously contemplated by the parties to which and from which the users of the buses would be going and coming in the regular course of operation of the track repair and maintenance crew.

The District Court's own distinction in terms can be as readily applied to the respondent's theory of the case as to the theory of the District Court's decision. If the word "work" as used in the insurance policy is interpreted to mean a job site, then coverage would necessarily have to extend to Cook and O'Hara under the facts of this case. The Court of Appeals discussed the error of the District Court on the issue (Petition, pages 26, 27) with clear understanding:

> "Apparently, the district judge considered that the words in the policy, 'to and from work,' meant a specific trip in the bus from the camp site to the job site. These words, however, are not defined in the policy; and the interpretation given them by the District Court would, in our opinion, be strictly against the insured and in favor of the insurer. If the insurer had intended the limited construction, it should have put definitive words into the policy issued by it. The trial court based its interpretation of the policy terms upon the fact, as it stated, that Cook and O'Hara were already 'at work' they could not be going to or from work if they were actually 'at work.' If this were a correct interpretation, there would be small coverage supplied the Pennsylvania Railroad by the policy, for its employees could just as reasonably be said to be 'at work' when they boarded the buses at the Bucyrus camp site.

> "We think that the correct interpretation of the policy is that, when making the trip to Dunkirk, they were traveling in the bus to a job site and that, when making the return trip from Dunkirk to Upper Sandusky, they were making the trip from one job site to another. Such interpretation conforms to the accepted rule of liberal interpretation which has been discussed."

The logic and the law of this case could not be better stated. We believe the Court of Appeals reached the correct conclusion.

CONCLUSION

The Court of Appeals was presented with a very simple issue in this appeal, namely, whether or not more than one interpretation could be given with "equal reason" to the contested contract clause.

The legal principles establishing the rules of construction are not in conflict. There would be no disagreement among any of the courts of the United States on these principles. Considering the words "while being transported to or from work" in their usual and ordinary meaning, it was inescapable that they were, "with equal reason", open to more than one interpretation. When this conclusion was reached, based upon the interpretation of standard English words, the decision of the case was inevitable, dictated by the universal proposition that ambiguous insurance provisions must be construed in favor of the insured.

The Court of Appeals considered and decided the only issue presented. It decided this issue in accordance with the settled law of Ohio. These authorities are in agreement with the prior decisions of this Court and the prior decisions of the Court of Appeals. Therefore, no grounds exist

calling for the exercise of this Court's power of supervision, or requiring this Court to assume jurisdiction of the case.

The petition for certiorari should be denied.

ROSS W. SHUMAKER
240 Huron Street, Toledo, Ohio
Attorney for Respondent

Of Counsel
SHUMAKER, LOOP & KENDRICK
240 Huron Street, Toledo, Ohio
Attorneys for the Respondent.